No. 09-810

Supreme Court, U.S.
FILED
MAR 18 2010
OFFICE OF THE CLERK

In The

Supreme Court of the United States

GRAND RIVER ENTERPRISES SIX NATIONS, LTD.,

Petitioner,

v.

DUSTIN McDANIEL, in his official capacity as Attorney General, State of Arkansas,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

DUSTIN MCDANIEL
Attorney General
State of Arkansas

ERIC B. ESTES
Senior Assistant Attorney General
Counsel of Record
323 Center Street, Suite 200
Little Rock, Arkansas 72201
(501) 682-8090
Eric.Estes@ArkansasAG.gov

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the United States Court of Appeals for the Eighth Circuit correctly held that Petitioner's complaint failed to state claims that Arkansas Act 384 of 2005, enacted in relation to the Master Settlement Agreement among 52 governmental jurisdictions and various tobacco product manufacturers, was preempted by the Sherman Act, 15 U.S.C. §§ 1, *et seq.*, and violated the Commerce, Equal Protection, and Due Process Clauses of the Constitution of the United States, and the First Amendment thereto.

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INTRODUCTION

By its complaint, Petitioner challenges Arkansas Act 384 of 2005. The Arkansas General Assembly enacted that Act to advance the objectives of the 1998 tobacco Master Settlement Agreement ("MSA"), the "landmark" agreement that settled litigation between 52 states and territories and various tobacco product manufacturers, imposed significant advertising and marketing restrictions on the participating tobacco manufacturers, and has resulted in over $68 billion in settlement payments by tobacco manufacturers to the Settling States to date.

Petitioner's challenge is like numerous previous challenges to the MSA and related state legislation. None of these challenges has been successful, and most of them have been dismissed on Rule 12(b)(6) motions, just like the case below. Moreover, this Court has already denied petitions for certiorari in all five of the previous MSA-related cases that have come before it.

The pending Petition for a Writ of Certiorari raises the same issues that the previous unsuccessful petitions for certiorari have raised. The simple fact is that there is no split among any Circuits on whether the MSA or related legislation violates federal law. The only variance, if any, among lower courts has been a narrow procedural one, regarding the degree to which conclusory allegations about the MSA in the complaint should be accepted at face-value. That is

not the sort of variance that warrants this Court's attention.

STATEMENT OF THE CASE

A. The Master Settlement Agreement

Beginning in the mid-1990s, a large number of states, including Arkansas, sued the major cigarette manufacturers on a number of legal theories, seeking to recover the Medicaid costs and other damages incurred by the states as a result of smoking-related disease. The state lawsuits were settled by the execution of the MSA on November 23, 1998. The MSA was signed by 52 governmental jurisdictions, which are defined in the MSA as the "Settling States." The MSA was found to be in the public interest and approved by courts in all Settling States.

The MSA has been characterized by this Court as a "landmark" public health agreement. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 533 (2001). It addresses youth smoking, which the Court has described as "one of the most troubling public health problems facing our Nation today." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000). The MSA's objectives were to resolve the states' tobacco litigation, while simultaneously addressing the states' public health concerns regarding tobacco use, particularly by youth. The MSA significantly promotes public health in a variety of ways vital to reducing tobacco use, especially

among minors. It does this through a number of restrictions on the marketing, advertising, and promotional practices of the manufacturers that settled pursuant to its terms. These manufacturers are referred to as "Participating Manufacturers" or "PMs." Those manufacturers that settled pursuant to the MSA as of its execution date are referred to as "Original Participating Manufacturers" ("OPMs"), while those manufacturers that have since settled pursuant to the terms of the MSA are referred to as "Subsequent Participating Manufacturers" ("SPMs").

The MSA has had a dramatic, positive impact on public health, and this will likely increase over time. Because most smokers begin to smoke by the time they reach the age of 19, reductions in youth smoking will almost certainly translate into reductions in smoking in the overall population. Indeed, cigarette consumption declined 24% between 1997 and 2007. *Freedom Holdings, Inc. v. Cuomo*, 592 F.Supp.2d 684, 687 (S.D.N.Y. 2009), *appeal docketed*, No. 09-0547 (2d Cir. Feb. 10, 2009). These consumption declines will, in turn, lead to a substantial reduction in death and disease caused by smoking, and they will have a beneficial impact on the finances of the Settling States, as the costs of medical care for smoking-related diseases also decline.

In addition to the continuing public health benefits of the MSA, the PMs also agreed in the MSA to make payments to the Settling States in perpetuity. These payments are tied to the number of cigarettes each PM sells in a given year, reflecting the fact that

the harm caused by a manufacturer's cigarettes will vary depending on how many of its cigarettes are consumed. In exchange for both the public health provisions of the MSA and the future settlement payments, the Settling States released the PMs from liability for past and future monetary claims. To date, the Settling States have received approximately $68.3 billion pursuant to the MSA, of which Arkansas' share has been about $569 million.

B. Arkansas Act 1165 of 1999

The Settling States hoped to gain the participation of as many tobacco manufacturers as possible in the MSA, but recognized that some companies, referred to as "Non-Participating Manufacturers" ("NPMs") would decline to participate. NPMs, like Petitioner Grand River Enterprises Six Nations, Ltd., have no obligations under the MSA. None of the MSA's public health provisions applies to them, nor are they obligated to make any payments to the Settling States. The Settling States, therefore, preserved in the MSA all their past and future claims against NPMs.

The concern remained, however, that NPMs, unaffected by the MSA's marketing and advertising restrictions or by any obligation to make settlement payments to the Settling States, would expand their cigarette sales to youth and to an already-addicted adult population. Further, there was a risk that the Settling States might be unable to collect on any

future judgments against NPMs for the harm their products caused, in part because the harm might not become manifest until long after an NPM had entered the market, and perhaps exited it.

Arkansas' Escrow Statute, Act 1165 of 1999, was intended to address these concerns. The statute provides a source of recovery for future monetary liabilities arising from the sale of cigarettes by NPMs in Arkansas by requiring all NPMs whose cigarettes are sold in the State to make annual escrow deposits based on those sales. ARK. CODE ANN. § 26-57-261(a)(2) (Supp. 2007); *see also* ARK. CODE ANN. § 26-57-260(10)(A) (Supp. 2007) (defining "units sold" as the "number of individual cigarettes sold in the state"). On a per-cigarette (or per-pack or per-carton) basis, these deposits are fixed at a rate that is slightly lower than the amount that a NPM would be obligated to make in settlement payments if it were to join the MSA. ARK. CODE ANN. § 26-57-261(a)(2)(B). Arkansas has no right to the funds deposited into escrow by an NPM unless it obtains a settlement or judgment for tobacco-related claims against the NPM. ARK. CODE ANN. § 26-57-261(a)(2)(B)(i). If these escrowed amounts are not claimed, they are released to the NPM after 25 years; in the meantime, the NPM receives the interest on the escrow amounts as it is earned. ARK. CODE ANN. § 26-57-261(a)(2)(B)(iii).

As originally enacted, however, the Arkansas Escrow Statute, and identical statutes enacted by each of the other Settling States, had a loophole that certain NPMs exploited. An important feature of the

Arkansas Escrow Statute was the provision of Act 1165 of 1999 that permitted the early release of deposited escrow funds under certain circumstances. As originally passed by the Arkansas General Assembly, this escrow release provision read as follows:

> [T]o the extent that a tobacco product manufacturer establishes that the amount it was required to place into escrow in a particular year was greater than the State's allocable share of the total payments that such manufacturer would have been required to make in that year under the Master Settlement Agreement[,] as determined pursuant to section IX(i)(2) of the Master Settlement Agreement, and before any of the adjustments or offsets described in section IX(i)(3) of that Agreement other than the Inflation Adjustment[,] had it been a participating manufacturer, the excess shall be released from escrow and revert back to such tobacco product manufacturer[.]

1999 Ark. Acts 1165. This provision, sometimes referred to as the "Allocable Share Release," was intended to ensure that an NPM's escrow obligation under the Escrow Statute would approximate its hypothetical payment obligations under the MSA had it been a PM. An unforeseen and unintended consequence of this provision emerged, however, when certain NPMs determined that if they concentrated their sales in a few states, they could obtain an almost immediate release of practically all of their escrowed funds. This result followed because of

differences in the way MSA payments and Escrow Statute deposits are calculated.

Each cigarette sold by a PM anywhere in the United States results in a payment to the MSA Escrow Agent appointed pursuant to the MSA. The payment is then allocated among the Settling States according to the Allocable Share percentages, which are set forth in MSA Exhibit A. Each cigarette sold by an NPM, in contrast, results in a deposit with an escrow agent the NPM appoints pursuant to the Escrow Statute of the state in which the cigarette is sold. *See, e.g.*, ARK. CODE ANN. § 26-57-261(a)(2)(A). Under the assumption that NPMs sell in the national market, the MSA payment and escrow deposit would not produce significant differences in calculation, so the release would not be substantial. When NPMs sold in only a few states, however, the differences, and the releases, were dramatic.

For example, suppose that an NPM sold one million cigarettes in 2005, the year in which Petitioner filed its action. For 2005 sales, the escrow due on April 15, 2006, with the inflation adjustment, was $0.0208176 per cigarette[1] or $4.16 per carton, for a total escrow obligation of approximately $20,818. This is slightly less than what the NPM would have paid had it been an SPM selling that number of

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[1] This represents the rate for 2005 of $.0167539 per cigarette, adjusted for inflation, as set forth in the Escrow Statute. *See* ARK. CODE ANN. § 26-57-261(a)(2)(A)(iv).

cigarettes, as calculated under section IX of the MSA. Suppose further that those one million cigarettes were sold nationally, in correspondence to the allocable shares of each State under the MSA. This would imply that in Arkansas, which has an Allocable Share of 0.8280661%, the company would have sold 8,281 cigarettes. The company would then have owed escrow of $172 on its sales in Arkansas. Because that amount would have been slightly less than Arkansas' allocable share of the payments the NPM would have made to the MSA Escrow Agent on total sales of one million cigarettes, the NPM would have had no basis for seeking an allocable share release.

Suppose instead that the NPM sold *all* of its one million cigarettes in Arkansas. In that case, it would have had to deposit in escrow the entire $20,818 for sales in Arkansas. But, under the Allocable Share Release Provision as originally enacted, the NPM would have been entitled to receive an immediate release of the difference between the $20,818 and the MSA allocable share for Arkansas of $172, a release of *$20,646*. Thus, the NPM would have faced a net escrow obligation of only $0.000172 per cigarette (or approximately 3.5 cents per carton) sold in Arkansas after this allocable share release. This is far lower than either: (1) the escrow obligation owed by an NPM selling 8,281 cigarettes in Arkansas, but whose sales were distributed nationally, or (2) the MSA settlement amount paid by the NPM had it been a PM. Both would have made payments of somewhat more than $4.00 per carton for their 2005 sales,

which in turn would still be well below estimated costs per carton imposed on the State on account of smoking-related disease.

These large allocable share releases that Petitioner and certain other NPMs received on account of their sales in Arkansas frustrated the purposes of Act 1165 of 1999 because they enabled those NPMs to avoid the obligation to create a fund against which the State could recover its costs. The flawed release provision also allowed the NPMs to undercut the cigarette prices charged by PMs, making the NPMs' cigarettes more attractive to smokers or those considering smoking, including price-sensitive youth. This result, of course, undermined the MSA's objectives of reducing underage tobacco use and improving state treasuries.

C. Arkansas Act 384 of 2005

To address the adverse and unintended consequences of the Allocable Share Release Provision of Act 1165 of 1999 described above, the Arkansas General Assembly enacted Act 384 of 2005. This Act amended ARK. CODE ANN. § 26-57-261(a)(2)(B)(ii) to provide:

> To the extent that a tobacco product manufacturer establishes that the amount it was required to place into escrow on account of units sold in the state in a particular year was greater than the Master Settlement Agreement payments, as determined under

> section IX(i) of the Master Settlement Agreement including after final determination of all adjustments, that the manufacturer would have been required to make on account of the units sold had it been a participating manufacturer, the excess shall be released from escrow and revert back to such tobacco product manufacturer[.]

2005 Ark. Acts 384. The General Assembly specifically "found and determined" in the Emergency Clause of Act 384 that "smoking poses a serious health risk to Arkansans; that the [MSA] is a critical component in reducing the rate of smoking in Arkansas; and that the provisions of this act are immediately necessary for the continued effective administration and enforcement of provisions of the [MSA] in Arkansas." *Id.*

Act 384 of 2005, known as the Allocable Share Amendment, produces an "apples-to-apples" comparison because it calculates escrow releases by comparing the escrow deposit for an NPM's cigarettes sold in Arkansas with its hypothetical MSA payment for those very same cigarettes, and not arbitrarily limiting the comparison to Arkansas' less-than-one-percent Allocable Share of that payment. This result, in turn, ensures that the legislature's purposes in enacting the Escrow Statute will be served. Unlike the original provisions of the Escrow Statute, Act 384 of 2005 creates a fund that is more likely to adequately satisfy future judgments or settlements to reimburse Arkansas for its health care costs

associated with the use of NPMs' tobacco products. Act 384 of 2005 also establishes funds in escrow that are proportional to the number of each NPM's cigarettes sold in Arkansas.

Act 384 of 2005, which is challenged by Petitioner, simply corrects the escrow release provision that inadvertently permitted the release to NPMs of deposits in amounts that had no correlation to the underlying objectives of the MSA and the Escrow Statute. Petitioner asserts that it will be harmed if NPMs are not permitted to continue exploiting the unintended loophole in the Escrow Statute, and that the Sherman Act, 15 U.S.C. §§ 1, *et seq.*, and the Constitution of the United States require that the statute not be changed. As correctly noted by the district court in its March 6, 2006 Order, however, it is apparent that Petitioner's litigation objective is to restore the artificial competitive advantage that it was able to exploit under the prior law. Nothing in the Sherman Act or Constitution of the United States, however, entitles Petitioner to any such competitive advantage or precludes the State from enacting or enforcing Act 384 of 2005.

D. The Proceedings Below

1. Petitioner filed its complaint on March 29, 2005, in the U.S. District Court for the Western District of Arkansas, seeking preliminary and permanent injunctive relief against Arkansas' enforcement of the Allocable Share Amendment. The complaint

alleged that the Amendment violated and was preempted by the Sherman Act, 15 U.S.C. § 1, and that it violated the First Amendment to the Constitution of the United States, the Equal Protection Clause, the Due Process Clause, and the Commerce Clause. The complaint also alleged violations of provisions of the Constitution of the State of Arkansas not relevant here.

On March 6, 2006, the district court entered an Order dismissing all aspects of Petitioner's complaint, save a single allegation that the Arkansas General Assembly unlawfully made Act 384 of 2005 retroactive.[2] The district court held that the State was immune from liability under the Sherman Act by virtue of the state action immunity doctrine of *Parker v. Brown*, 317 U.S. 341 (1943), and that Petitioner had failed to allege facts sufficient to preempt the Allocable Share Amendment under the test of *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982). App. B, 56a. The district court rejected Petitioner's First Amendment claim, finding that NPMs are not penalized for refusing to sign the MSA and relinquishing free speech rights. It held that the Allocable Share Amendment does not require Petitioner, "or any other NPM, to pay more per cigarette into escrow than it would pay per cigarette under the MSA if it

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[2] This single issue was settled by the parties on January 29, 2008. This resulted in Petitioner having a final order from which to take an appeal on the claims that had been dismissed by the district court on March 6, 2006.

were a PM." *Id.* at B, 63a-64a. The district court also rejected Petitioner's Equal Protection Clause claim. Applying rational basis review, it found the Amendment was an exercise of Arkansas' "police powers, to protect the health and welfare of its citizens," and that its provisions "reflect a rational relationship between the Amendment and its purpose." *Id.* at B, 68a. For the same reasons, the district court rejected Petitioner's substantive due process claim.

The district court further held that Petitioner's procedural due process claim failed to state a claim. It held that Petitioner had been temporarily deprived of its property by being required to deposit funds in escrow, but that Petitioner received due process because a pre-deprivation hearing was not required under the factors set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976). App. B, 77a. Finally, the district court held that Petitioner had failed to state a claim under the dormant Commerce Clause because the Allocable Share Amendment did not distinguish between intrastate and interstate transactions and treated all NPMs, wherever located, even-handedly. *Id.* at B, 83a.

2. The Court of Appeals for the Eighth Circuit affirmed by a 2-1 majority. It applied the test for antitrust preemption in *Rice*, 458 U.S. at 661: A state statute may be preempted "only if it mandates or authorizes conduct that necessarily constitutes a violation of [the antitrust] laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the

statute." App. A, 10a. The court of appeals noted that while Petitioner had alleged that the Allocable Share Amendment produces an "anticompetitive effect," "this effect is insufficient to constitute an antitrust violation" under *Rice* because the "Amendment does not expressly allow price-fixing or output-fixing or other illegal behavior, nor does it place 'irresistible pressure' on [Petitioners] to violate antitrust laws." *Id.* at A, 12a. The court of appeals also held that the Allocable Share Amendment does not create a "hybrid restraint" that grants regulatory power to private parties to set prices or output for others, noting that the Amendment operates differently from the statute at issue in *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987), in that it does nothing more than "set[ ] an amount that NPMs must contribute to the state fund as a cost of doing business in Arkansas." App. A, 17a. Lastly, the court held that because the MSA and Allocable Share Amendment were the result of actions of the state executive and legislative branches, they "ipso facto are exempt from the operation of the antitrust laws" under *Parker v. Brown*. App. A, 21a (quoting *Hoover v. Ronwin*, 466 U.S. 558, 567-68 (1984)).

The court of appeals also affirmed the dismissal of Petitioner's other claims. With respect to Petitioner's dormant Commerce Clause claim, the court found that the Allocable Share Amendment did not discriminate against interstate commerce; that it did not impose burdens on interstate commerce that were excessive in relation to the benefits it provided the

State; and that it did not regulate commerce outside of Arkansas. With respect to Petitioner's claim of extraterritorial effect, which underlies its claim here of an alleged conflict with the Second Circuit, the Eighth Circuit found:

> [T]he Allocable Share Amendment at issue here is not based on cigarette sales outside of Arkansas. NPM escrow payments are entirely a function of an NPM's sales in Arkansas. The payments are not based on nationwide sales. Nor has there been a showing by the appellants that escrow payments by NPMs in Arkansas have any effect, either directly or indirectly, on cigarette prices in other states. NPMs must make escrow payments *to* Arkansas based on that NPM's cigarette sales *in* Arkansas. Arkansas has no control over cigarette prices in other states.

App. A, 28a (emphases in original). The court distinguished the Amendment from the Connecticut statute held unconstitutional in *Healy v. Beer Inst., Inc.*, 491 U.S. 324 (1989), under which prices in that state effectively controlled prices in other states. The court also rejected Petitioner's reliance on *Grand River Enters. Six Nations Ltd. v. Pryor*, 425 F.3d 158 (2d Cir. 2005), because while that decision had described a "possible claim" of extraterritorial pricing effect that could be stated under the Commerce Clause, *id.* at 172, on remand the district court in that case had denied a preliminary injunction motion, finding that

Petitioner was unlikely to succeed on that claim. App. A, 27a-28a.

Addressing Petitioner's equal protection and substantive due process claims, the court of appeals held that rational basis review was appropriate, and that while the Allocable Share Amendment treats PMs and NPMs differently, the "difference in treatment is rationally related to the state's legitimate interest in collecting future medical costs related to tobacco use." *Id.* at A, 30a. The court also held that partial MSA payment exemptions granted to some PMs as an inducement for them to sign the MSA and relinquish some First Amendment rights did not require that the Allocable Share Amendment be given heightened equal protection scrutiny because the Amendment does not compel NPMs to sign the MSA, and they retain their rights of free speech. *Id.* at A, 30a. Finally, the court affirmed the dismissal of Petitioner's procedural due process and First Amendment claims, substantially following the reasoning of the district court.

REASONS FOR DENYING THE PETITION

The Petition should be denied because (1) there is no Circuit conflict on Petitioner's antitrust and dormant Commerce Clause claims, and Petitioner does not even assert a conflict on its remaining claims, (2) Petitioner's claims raise no issues of

national importance, and (3) the Eighth Circuit was correct on the merits.

Like the Eighth Circuit, every court that has arrived at a final decision on a challenge to the MSA or a state Escrow Statute has rejected that challenge as a matter of law. Indeed, this Court has denied certiorari in five previous cases challenging on various grounds the MSA or an Escrow Statute. *Sanders v. Brown*, 504 F.3d 903 (9th Cir. 2007), *cert. denied*, 128 S.Ct. 2427 (2008); *Mariana v. Fisher*, 338 F.3d 189 (3d Cir. 2003), *cert. denied*, 540 U.S. 1179 (2004); *Star Scientific, Inc. v. Beales*, 278 F.3d 339 (4th Cir. 2002), *cert. denied*, 537 U.S. 818 (2002); *A.D. Bedell Wholesale Co., Inc. v. Philip Morris Inc.*, 263 F.3d 239 (3d Cir. 2001), *cert. denied*, 534 U.S. 1081 (2002); *Hise v. Philip Morris Inc.*, 208 F.3d 226 (10th Cir. 2000), *cert. denied*, 531 U.S. 959 (2000). The passage of time has only added to the weight of authority upholding the MSA and Escrow Statues, as demonstrated below. Accordingly, there is no need for intervention by this Court, and the Petition for Certiorari should be denied.

I. THERE IS NO CIRCUIT CONFLICT ON ANY OF THE ISSUES PRESENTED BY PETITIONER

Petitioner has not shown any Circuit conflict warranting a grant of certiorari in this case. Petitioner's claim of Circuit conflict arises from the fact that the Second and Third Circuits, reading

different allegations about different state actions, reached different conclusions than the Eighth Circuit as to whether the conclusory claims before them should have been dismissed pursuant Fed. R. Civ. P. 12(b)(6). The decisions of the Second and Third Circuits, on which Petitioner relies to establish a conflict with the decision below, however, did not reflect differing views on the substantive issues before those courts. At most, those decisions suggested that the courts may hold different views from that of the Eighth Circuit with respect to the degree of scrutiny that should be given on a motion to dismiss to a particular set of allegations about the MSA and related state legislation. Subsequent decisions by trial courts in the Second Circuit foreshadow final outcomes in that Circuit entirely consistent with those reached by the Eighth Circuit. Finally, Petitioner fails to identify *any* purported conflict between Circuits on its Equal Protection, Due Process, and First Amendment claims, which is not surprising because those claims have been universally rejected.

1. Petitioner asserts that the Eighth Circuit's decision conflicts with those of other courts of appeals on the question of whether state legislative provisions similar to Act 384 of 2005 violate the Sherman Act, 15 U.S.C. §§ 1, *et seq.* For this assertion, Petitioner relies on *Grand River Enters. Six Nations, Ltd. v. Pryor*, 425 F.3d 158 (2d Cir. 2005), *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205 (2d Cir. 2004), and *A.D. Bedell Wholesale Co., Inc. v. Philip Morris Inc.*, 263 F.3d 239

(3d Cir. 2001). Pet. 13. None of those decisions, however, conflict with that of the Eighth Circuit in this case.

First, in *Freedom Holdings* the Second Circuit, for purposes of reviewing a Rule 12(b)(6) dismissal, accepted as true certain conclusory allegations in the complaint. *Freedom Holdings,* 357 F.3d at 208-09, 216, 225, & 230. The court then concluded that the plaintiffs had "sufficiently *alleged* a per se violation of the Sherman Act." *Id.* at 226 (emphasis added). It remanded the case to the district court to determine whether the plaintiffs could prove their allegations. Thus, at most, the Second and Eighth Circuits, while applying the same basic legal principles, disagreed about the extent of their obligation to accept conclusory allegations within the complaint as true. Moreover, the Second Circuit might well have scrutinized the allegations in the complaint with greater care had it decided the case after this Court's decision in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

On remand, the United States District Court for the Southern District of New York examined the allegations in Freedom Holdings' complaint against a full factual record and granted summary judgment for the New York Attorney General. In doing so, the court stated:

> Plaintiffs have failed to prove the allegations of their Complaint, and thus the foundation for the court of appeals' rulings does not exist. Plaintiffs have presented no credible proof that the MSA has created a cartel

> favoring participating cigarette manufacturers. Nor have they presented proof that the NPMs have suffered, or are likely to suffer, any antitrust injury.

Freedom Holdings, Inc. v. Cuomo, 592 F.Supp.2d 684, 700 (S.D.N.Y. 2009), *appeal docketed*, No. 09-0547 (2d Cir. Feb. 10, 2009). Another district court in the Second Circuit has reached the same conclusion in the context of a preliminary injunction ruling after several days of hearings. *Grand River Enters. Six Nations, Ltd. v. Pryor*, 2006 WL 1517603, *8-9 (S.D.N.Y. 2006), *aff'd on other grounds*, 481 F.3d 60 (2d Cir. 2007) (finding that Grand River had not shown a likelihood of success on its antitrust preemption claim). There is no reason at present to believe that the final judgment in either of these two cases in the Second Circuit will produce a conflict with the Eighth Circuit's decision in this case, but if such a conflict does arise, this Court can consider whether to address it at that time.

Second, like the *Freedom Holdings* decision, *A.D. Bedell* was merely a pleading case. Consequently, as with the Second Circuit's *Freedom Holdings* decision, the Third Circuit disagreed with the Eighth Circuit at most with regard to the sufficiency of particular allegations about the MSA and related legislation at the motion-to-dismiss stage. Furthermore, the Third Circuit dismissed allegations that the MSA violated the Sherman Act because the only defendants there (the OPMs) were entitled to *Noerr-Pennington* immunity for their participation in the MSA. *A.D.*

Bedell, 263 F.3d at 250-54. When holding that *Noerr-Pennington* barred the complaint, the Third Circuit admitted that "our analysis could end here." *Id.* at 254. The Third Circuit's statements on which Petitioner relies, therefore, were plainly *dicta* because they were not necessary to the disposition of the case. In addition, in *Mariana v. Fisher*, 338 F.3d 189, 203 (3d Cir. 2003), *cert. denied*, 540 U.S. 1179 (2004), the Third Circuit questioned the soundness of its own *Parker* analysis in *A.D. Bedell*.

Third, the Second Circuit's *Grand River* decision did not address an antitrust claim; instead, it simply referred to that court's earlier *Freedom Holdings* decision and noted that the district court in *Grand River* had reinstated Petitioner's claim following the latter decision. *Grand River*, 425 F.3d at 164.

In sum, none of the three decisions that Petitioner contends are in conflict with the Eighth Circuit's decision on Petitioner's antitrust claim against the Allocable Share Amendment actually supports that contention.[3]

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[3] Petitioner asserts that Judge Limbaugh's dissent supports its contention that the Eighth Circuit's decision on its antitrust claim conflicts with *Freedom Holdings* and *A.D. Bedell*. Pet. 15. Judge Limbaugh, however, concluded that "the Attorney General of Arkansas is immune from Sherman Act liability . . . under the state action immunity doctrine" of *Parker v. Brown*, and agreed with the majority that the district court correctly dismissed Petitioner's antitrust claim. App. A, 35a.

Furthermore, the Eighth Circuit's decision was plainly in line with this Court's governing precedents. *Rice v. Norman Williams Co.*, to which Petitioner nowhere refers, sets forth an exacting standard for preemption of a state enactment by the Sherman Act: "A party may successfully enjoin the enforcement of a state statute only if the statute on its face irreconcilably conflicts with federal antitrust policy." *Rice*, 458 U.S. at 659. The Allocable Share Amendment, whether considered by itself or in conjunction with the MSA, does not mandate or authorize private parties to engage in *per se* violations of the Sherman Act, nor does it place irresistible pressure on them to do so in order to comply with the statute. As every court that has examined the issue has determined, the amended Escrow Statute simply requires NPMs to deposit funds in escrow for sales of their cigarettes in Arkansas that are approximately the same in amount as the payments they would make on those cigarettes if they were PMs that had signed the MSA. The MSA and Allocable Share Amendment, therefore, impose a specified cost on every cigarette sold by a manufacturer, regardless of how many cigarettes it sells or how its market share may change. This cost is analogous to a fixed excise tax, and it does not affect price competition.

Nor does the Amendment effect or implement a "hybrid restraint" by granting a private party "a degree of private regulatory power" that allows that party to compel other private actors to follow its pricing or other "private marketing decisions." *Fisher*

v. City of Berkeley, Cal., 475 U.S. 260, 268 (1986) (internal quotation marks omitted). It is, therefore, quite unlike the state statute condemned in *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987), which authorized alcohol wholesalers to dictate the prices charged by retailers. Every tobacco product manufacturer, whether a party to the MSA or not, is free to set its own prices and output, and none has control over any other manufacturer's prices or output.

Finally, it is noteworthy that *every* case that has proceeded to a final decision on an antitrust-related claim has held that state legislative provisions similar to Act 384 of 2005 are *not* preempted. *See, e.g., Xcaliber Int'l Ltd., LLC v. Caldwell*, 2009 WL 1324042 (E.D. La. 2009), *appeal docketed*, No. 09-30942 (5th Cir. June 10, 2009); *Int'l Tobacco Partners, Ltd. v. Kline*, 475 F.Supp.2d 1078 (D. Kan. 2007); *Xcaliber Int'l Ltd., LLC v. Kline*, 2006 WL 288705 (D. Kan. 2006), *aff'd*, 535 F.3d 1114 (10th Cir. 2008); *Sanders v. Lockyer*, 365 F.Supp.2d 1093 (N.D. Cal. 2005), *aff'd*, 504 F.3d 903 (9th Cir. 2007), *cert. denied*, 128 S.Ct. 2427 (2008); *S & M Brands, Inc. v. Summers*, 393 F.Supp.2d 604 (M.D. Tenn. 2005), *aff'd*, 228 Fed.Appx. 560 (6th Cir. 2007); *Tritent Int'l Corp. v. Ky.*, 2005 WL 3766971 (E.D. Ky. 2005), *aff'd*, 467 F.3d 547 (6th Cir. 2006); *Xcaliber Int'l Ltd., LLC v. Edmondson*, 2005 WL 5654220 (N.D. Okla. 2005), *aff'd*, 535 F.3d 1114 (10th Cir. 2008). The decisions of the United States Courts of Appeals for the Sixth, Ninth, and Tenth Circuits underscore the fact that no Circuit conflict exists.

2. In support of its claim that there is a Circuit conflict on the question of whether the Allocable Share Amendment, in combination with the MSA, violates the Commerce Clause, Petitioner relies entirely on the decision of the Second Circuit in *Grand River Enters. Six Nations, Ltd. v. Pryor*, 425 F.3d 158 (2d Cir. 2005), in which Petitioner here was the plaintiff. Pet. 16-17. The Second Circuit, however, merely concluded that, assuming a variety of conclusory allegations to be true, the complaint "stated a *possible* claim that the practical effect of the challenged statutes and the MSA is to control prices outside of the enacting states by tying both the SPM settlement and NPM escrow payments to national market share, which in turn affects interstate pricing decisions." *Grand River*, 425 F.3d at 173 (emphasis added). The court took "no position as to the [claim's] ultimate viability." *Id.* As with Petitioner's antitrust claim, therefore, there is, at most, a difference between the Second and Third Circuits regarding the extent to which they were willing to accept conclusory allegations and evaluate the plausibility of claims at the pleading stage pre-*Twombly*.

Moreover, on remand, the United States District Court for the Southern District of New York examined the actual operation of the Escrow Statutes in the context of a motion for preliminary injunction, and concluded that Petitioner had failed to "establish a likelihood of success on the merits of the Commerce Clause claim." *Grand River Enters. Six Nations, Ltd. v. Pryor*, 2006 WL 1517603, *10 (S.D.N.Y. 2006), *aff'd*

on other grounds, 481 F.3d 60 (2d Cir. 2007). In particular, the district court found that "Grand River has not shown that this scheme [*i.e.*, the method of calculating escrow releases] may result in interstate price control," *id.* at *9, which was the "possible claim" the Second Circuit had identified. The district court further found that the amended Escrow Statute "neither makes cigarette prices or escrow payments in a particular State dependent on prices or escrow payments in other States, nor does it have any effect on price or escrow payments by NPMs in other states." *Id.* The district court in *Freedom Holdings, Inc. v. Cuomo,* in which the plaintiffs had "copied the *Grand River* complaint," 592 F.Supp.2d at 706, reached a like result, finding on summary judgment that "New York exerts no control, actual or 'practical,' over the price of cigarettes in any other State." *Id.* at 707.

Thus, two district courts in the Second Circuit have now examined the allegations that the Second Circuit Court of Appeals held in *Grand River* stated a "possible claim" under the dormant Commerce Clause, and, like the Eighth Circuit, have found those allegations to be inconsistent with the language and actual operation of the Escrow Statutes as amended by the Allocable Share Amendment. Now that the *Freedom Holdings* and *Grand River* cases have progressed beyond the pleading stage, any concern that there is a conflict based on the Second Circuit's earlier decision relying on unproven allegations has been dispelled.

The conclusions in those decisions, like those of the Eighth Circuit, were based upon a plain reading of the Escrow Statute. The Arkansas statute provides, in relevant part:

> Any tobacco product manufacturer selling cigarettes to consumers *within the state*, whether directly or through a distributor, retailer, or similar intermediary or intermediaries, after the date of enactment of this section and [ARK. CODE ANN.] § 26-57-260, shall . . . [p]lace into a qualified escrow fund by April 15 of the year following the year in question the following amounts, as such amounts are adjusted for inflation . . . [f]or each of 2003 through 2006: $.0167539 per unit sold[.]

ARK. CODE ANN. § 26-57-261(a)(2)(A)(iv) (Supp. 2007) (emphasis added). A "unit sold" is defined, in part, as "the number of individual cigarettes sold *in the state* . . . as measured by excise taxes collected *by the state* on packs or roll-your-own tobacco containers bearing the excise tax stamp *of the State*." ARK. CODE ANN. § 26-57-260(10)(A) (Supp. 2007) (emphases added).

As the application of ARK. CODE ANN. § 26-57-261 is facially restricted solely to Arkansas, the State is not regulating commerce occurring in other states. For the same reasons, as the Eighth Circuit found (App. A, 26a-29a), the Escrow Statutes of all Settling States collectively have no potential to create the kind of interstate regulatory gridlock that concerned the Court in *Healy v. Beer Inst., Inc.*, 491 U.S. 324

(1989). Whether considered by itself or in combination with the MSA, Arkansas' Escrow Statute in no way regulates interstate commerce in the manner alleged by Petitioner.

Other courts have uniformly agreed with this conclusion. Indeed, *every* case that has proceeded to a final decision has held that state legislative provisions similar to Act 384 of 2005 are *not* violative of the Commerce Clause. *See, e.g., KT&G Corp. v. Attorney Gen. of State of Okla.*, 535 F.3d 1114 (10th Cir. 2008); *Star Scientific, Inc. v. Beales*, 278 F.3d 339 (4th Cir. 2002), *cert. denied*, 537 U.S. 818 (2002); *Int'l Tobacco Partners, Ltd. v. Kline*, 475 F.Supp.2d 1078 (D. Kan. 2007); *Xcaliber Int'l Ltd., LLC v. Caldwell*, 2009 WL 1324042 (E.D. La. 2009), *appeal docketed*, No. 09-30492 (5th Cir. June 10, 2009); *Mariana v. Fisher*, 226 F.Supp.2d 575 (M.D. Pa. 2002), *aff'd on other grounds*, 338 F.3d 189 (3d Cir. 2003), *cert. denied*, 540 U.S. 1179 (2004); *PTI, Inc. v. Philip Morris Inc.*, 100 F.Supp.2d 1179 (C.D. Cal. 2000). The decisions of the United States Court of Appeals for the Fourth and Tenth Circuits underscore the fact that no Circuit conflict exists.

II. THIS CASE RAISES NO ISSUES OF NATIONAL IMPORTANCE

Petitioner does not assert that its claims against the Arkansas Allocable Share Amendment raise issues of national importance, nor could it. The MSA and related legislation are undeniably important;

indeed, as noted above, this Court has characterized the MSA as a "landmark" public health agreement. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 533 (2001). But after more than eleven years of unsuccessful challenges, no serious question remains with regard to the validity of the MSA and the Escrow Statutes. As discussed above and in Part III below, every case that has reached a final decision has upheld their validity. State governments and private parties are making their future plans in reliance on those decisions.

Elevating its own situation into one of national importance, Petitioner argues merely that "it is not tenable for the *same litigant* to make the *same allegations* in different Circuits, and be permitted to litigate its claims in one Circuit (and to obtain relief if its case is proven) and for its claims to be dismissed pursuant to Rule 12(b)(6) in another Circuit. . . ." Pet. 10 (emphases in original). As demonstrated above, however, whatever differences may exist among Circuits regarding the degree to which particular allegations regarding the MSA and related legislation should be accepted as true without further inquiry at the pleading stage, those differences do not require this Court's intervention.

Furthermore, the situation in which Petitioner now finds itself is not only one that will give Petitioner the opportunity to attempt to prove its allegations and claim a Circuit split in the unlikely event it is successful on the merits, but it is one of Petitioner's own making. Petitioner "rolled the dice"

by filing multiple lawsuits against multiple Settling States regarding similar factual claims. As this Court recently observed, the willingness of litigants and their lawyers to bring "even anemic cases" in hopes of extracting a settlement or hitting a jackpot is a problem to be addressed, as the lower courts did in this case, by carefully scrutinizing pleadings. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007).

III. THE EIGHTH CIRCUIT CORRECTLY DECIDED THAT DISMISSAL OF PETITIONER'S CLAIMS WAS APPROPRIATE

Petitioner asserts that the Eighth Circuit erred in affirming the dismissal of each of its five claims. Petitioner does not, however, identify any incorrect legal principles applied below; instead, it simply argues that the Eighth Circuit misapplied well-established legal principles to the particular facts presented by the MSA and amended Escrow Statutes.

In any event, as explained in Part I above, the Eighth Circuit's decision regarding Petitioner's antitrust and dormant Commerce Clause claims was correct and was in accord with the decisions of other courts that have reached a final decision on those claims as well as with established Supreme Court authority. The same is true of Petitioner's other three claims.

1. With regard to Petitioner's equal protection claim, Act 384 of 2005 is a straightforward example of

health and economic regulatory legislation. It is, therefore, subject to the deferential standard of review for the purposes of equal protection analysis: "In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993).

Petitioner contends that the Eighth Circuit should have subjected the Allocable Share Amendment to strict scrutiny under *Speiser v. Randall*, 357 U.S. 513 (1958), which involved a state statute that denied tax exemptions to veterans who refused to swear to a loyalty oath. According to Petitioner, certain SPMs have been granted payment exemptions "as an incentive to join the MSA and relinquish their First Amendment rights." Pet. 22. As the Eighth Circuit noted, however, *Speiser* is inapposite because the Amendment "neither compels nor abridges free speech rights." App. A, 30a. Petitioner is not a party to the MSA, and the amended Escrow Statute places no restrictions on its speech. Both courts below rejected as a matter of fact Petitioner's contention that it was penalized for not signing the MSA. App. A, 33a; App. B, 66a. Indeed, the Eighth Circuit noted that Petitioner was really complaining about its loss of the competitive advantage it had enjoyed under the pre-Amendment Escrow Statute. *Id.* at A, 33a.

Petitioner further contends that the Amendment fails rational basis review because Arkansas has no legitimate interest in allowing a payment exemption to some SPMs, but not to Petitioner. Pet. 21. The Eighth Circuit correctly found this difference to be "rationally related to the state's legitimate interest in collecting future medical costs related to tobacco use." App. A, 30a. Thus, the amended Escrow Statute rationally distinguishes between NPMs, which have not settled the State's claims against them and which are required to make escrow deposits, and PMs, which have settled those claims in exchange for large payment obligations and significant restrictions on their conduct. *See, e.g., Star Scientific, Inc.*, 278 F.3d at 351 (holding that Virginia's Escrow Statute passes Equal Protection Clause scrutiny because its "distinctions are rationally related to Virginia's legitimate purpose of ensuring a source of recovery from *all* manufacturers for Virginia's future costs related to cigarette smoking") (emphasis in original).

The so-called Exempt SPMs were given reduced payment obligations as an incentive for them to join the MSA within 90 days. This was rationally related to the legitimate state interest of including as many tobacco manufacturers as possible in the MSA. *See Id.* at 353-54. In any event, "[t]he rationality commanded by the Equal Protection Clause does not require States to match [classifications] and the legitimate interests they serve with razorlike precision." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 63-64 (2000). The rule of deference to legislative judgment

is particularly strong here, where the challenged classification merely determines which economic actors are subject to a particular regulatory requirement and which are not. *See Beach Commc'ns, Inc.*, 508 U.S. at 316 ("Such scope-of-coverage provisions are unavoidable components of most economic or social legislation[, because] Congress had to draw the line somewhere. . . . This necessity renders the precise coordinates of the resulting legislative judgment virtually unreviewable, since the legislature must be allowed leeway to approach a perceived problem incrementally.").

The Arkansas General Assembly declared in the Emergency Clause of Act 384 of 2005 that the Act, and the Escrow Statute of which it is a part, is "a critical component in reducing the rate of smoking in Arkansas," and that "smoking poses a serious health risk to Arkansans." 2005 Ark. Acts 384. As the district court recognized: "These provisions of the Emergency Clause reflect a rational relationship between the Amendment and its purpose." *Grand River Enters. Six Nations Ltd. v. Beebe,* 418 F.Supp.2d 1082, 1094 (W.D. Ark. 2006). App. B, 68a. The Amendment, therefore, fully satisfies the requirements of the Equal Protection Clause.[4]

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[4] Equal protection challenges to the original and amended Escrow Statute have been uniformly unsuccessful, including one by Petitioner. *See KT&G Corp. v. Attorney Gen. of State of Okla.*, 535 F.3d 1114 (10th Cir. 2008); *Star Scientific, Inc. v. Beales*, 278 F.3d 339, 351 (4th Cir. 2002) (original Escrow Statute); *Xcaliber*

(Continued on following page)

2. Petitioner's Due Process Clause claim encompasses both substantive and procedural due process. With respect to substantive due process, Act 384 of 2005 satisfies the "rational basis" test for substantive due process for the same reasons it does not infringe Petitioner's rights under the Equal Protection Clause. Petitioner does nothing more than assert that Arkansas has no legitimate interest in various features of the amended Escrow Statute, or that the Statute lacks a "rationale" or "a rational relation to the purported State interest it serves." Pet. 23-24. These erroneous assertions afford no basis for this Court to review the decision below.

Both the district court and the Eighth Circuit thoroughly analyzed Petitioner's procedural due process claim in accordance with the decision of this Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976). Both courts concluded that Act 384 of 2005 comports with due process because the factors outlined in *Mathews* "weigh in favor of the State's interest" and

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Int'l Ltd., LLC v. Caldwell, 2009 WL 1324042 (E.D. La. 2009), *appeal docketed*, No. 09-30492 (5th Cir. June 10, 2009); *Int'l Tobacco Partners, Ltd. v. Beebe*, 420 F.Supp.2d 989 (W.D. Ark. 2006); *Dos Santos, S.A. v. Beebe*, 418 F.Supp.2d 1064 (W.D. Ark. 2006); *S & M Brands, Inc. v. Summers*, 393 F.Supp.2d 604 (M.D. Tenn. 2005), *aff'd*, 228 Fed.Appx. 560 (6th Cir. 2007); *Grand River Enters. Six Nations Ltd. v. Pryor*, 2003 WL 22232974 (S.D.N.Y. 2003) (original Escrow Statute), *vacated in part on other grounds*, 2004 WL 1594869 (S.D.N.Y. 2004), *reversed on other grounds*, 425 F.3d 158 (2d Cir. 2005), *rehearing denied* (Jan. 3, 2006); *PTI, Inc. v. Philip Morris Inc.*, 100 F.Supp.2d 1179 (C.D. Cal. 2000) (original Escrow Statute).

because "before any escrow funds are permanently retained, the State must seek and be granted a court judgment or enter into a settlement with [the State]." App. A, 32a. Petitioner ignores that analysis, and instead simply contends that "there was no legally sufficient basis for rejecting, as a matter of law," its due process claims. Pet. 24. It also contends that the Eighth Circuit "failed to address" or "did not address" certain of its arguments. *Id.* at 24-25. As with Petitioner's substantive due process claim, these claims of error do not warrant a grant of certiorari.[5]

3. Finally, Petitioner argues that "Arkansas has enacted a fare for the exercise" of NPMs' First Amendment rights because it imposes on NPMs that do not limit their exercise of those rights certain financial burdens that it does not impose on

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[5] Due Process challenges to the original and amended Escrow Statute, including a previous one by Petitioner, have all failed. *See KT&G Corp. v. Attorney Gen. of State of Okla.*, 535 F.3d 1114 (10th Cir. 2008); *Star Scientific, Inc. v. Beales*, 278 F.3d 339, 351 (4th Cir. 2002) (original Escrow Statute); *Xcaliber Int'l Ltd., LLC v. Caldwell*, 2009 WL 1324042 (E.D. La. 2009), *appeal docketed*, No. 09-30492 (5th Cir. June 10, 2009); *Int'l Tobacco Partners, Ltd. v. Beebe*, 420 F.Supp.2d 989 (W.D. Ark. 2006); *Dos Santos, S.A. v. Beebe*, 418 F.Supp.2d 1064 (W.D. Ark. 2006); *S & M Brands, Inc. v. Summers*, 393 F.Supp.2d 604 (M.D. Tenn. 2005), *aff'd*, 228 Fed.Appx. 560 (6th Cir. 2007); *Grand River Enters. Six Nations Ltd. v. Pryor*, 2003 WL 22232974 (S.D.N.Y. 2003) (original Escrow Statute), *vacated in part on other grounds*, 2004 WL 1594869 (S.D.N.Y. 2004), *reversed on other grounds*, 425 F.3d 158 (2d Cir. 2005), *rehearing denied* (Jan. 3, 2006); *PTI, Inc. v. Philip Morris Inc.*, 100 F.Supp.2d 1179 (C.D. Cal. 2000) (original Escrow Statute).

manufacturers who sign the MSA. Pet. 26. As already noted, however, both the district court and the Eighth Circuit held that NPMs are not penalized financially for refusing to give up their First Amendment rights; accordingly, both courts concluded that the Allocable Share Amendment does not unconstitutionally burden free speech. App. A, 33a; App. B, 66a. Petitioner offers nothing more than a disagreement with those courts' holdings. That is not a ground for issuing a writ of certiorari.[6]

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[6] No First Amendment challenge to the original and amended Escrow Statute, including one by Petitioner, has succeeded. *See KT&G Corp. v. Attorney Gen. of State of Okla.*, 535 F.3d 1114 (10th Cir. 2008); *Grand River Enters. Six Nations Ltd. v. Pryor*, 2003 WL 22232974 (S.D.N.Y. 2003) (original Escrow Statute), *vacated in part on other grounds*, 2004 WL 1594869 (S.D.N.Y. 2004), *reversed on other grounds*, 425 F.3d 158 (2d Cir. 2005), *rehearing denied* (Jan. 3, 2006); *Int'l Tobacco Partners, Ltd. v. Beebe*, 420 F.Supp.2d 989 (W.D. Ark. 2006); *Dos Santos, S.A. v. Beebe*, 418 F.Supp.2d 1064 (W.D. Ark. 2006); *S & M Brands, Inc. v. Summers*, 393 F.Supp.2d 604 (M.D. Tenn. 2005), *aff'd*, 228 Fed.Appx. 260 (6th Cir. 2007); *Xcaliber Int'l Ltd., LLC v. Caldwell*, 2009 WL 1324042 (E.D. La. 2009), *appeal docketed*, No. 09-30492 (5th Cir. June 10, 2009).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

DUSTIN MCDANIEL
Attorney General
State of Arkansas

ERIC B. ESTES
Senior Assistant Attorney General
Counsel of Record
323 Center Street, Suite 200
Little Rock, Arkansas 72201
(501) 682-8090
Eric.Estes@ArkansasAG.gov

Counsel for Respondent